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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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DARREN LAMONT BIGGERS, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Cooke County, Trial Cause CR17-00073
No. 07-18-00375-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant Darren Lamont Biggers.

* The trial judges were Hon. Janelle Haverkamp (voir dire) and Hon. Jim Hogan (guilt and punishment).

* Counsel for Appellant at trial were William and Ben Sullivant, Sullivant, Wright, & Brinkley, LLP, 209 South Dixon, Gainesville, Texas 76241.

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(2) Alternatively, if it is an element the State had to prove, is the evidence sufficient to meet that standard if it establishes the mixture smelled like cough syrup, contained another medicine commonly found in cough syrups, and was more than a trace amount?

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* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State Prosecuting Attorney respectfully urges this Court to grant discretionary review.

Texas prohibits possession without a prescription of any mixture containing codeine. Possession of the lowest tier—Penalty Group 4—also requires the mixture to be medicinal, even without the codeine. Affirmative evidence that it isn't makes

it PG-1. What happens when that fact isn't proven one way or the other? Is there no default? The Court avoided reaching this issue for different reasons in *Sanchez v. State*[1] and *Miles v. State*.[2] It is squarely presented here.

STATEMENT REGARDING ORAL ARGUMENT

"The law concerning possession of codeine is confusing and incoherent."[3] The State requests oral argument because it could help.

STATEMENT OF THE CASE

Appellant was indicted for possessing 400 grams or more of PG-4 codeine.[4] Appellant was tried on that charge (along with another), convicted, and, after pleading true to two prior consecutive felony convictions, sentenced to 60 years' confinement.[5] The court of appeals rendered a judgment of acquittal for insufficient

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[1] 275 S.W.3d 901 (Tex. Crim. App. 2009).
[2] 357 S.W.3d 629 (Tex. Crim. App. 2011).
[3] *Miles*, 357 S.W.3d at 638-39 (Cochran, J., concurring).
[4] The amended indictment can be found in the reporter's record at 8 RR 101 (DX 1). The only indictment included the clerk's record does not indicate what penalty group the codeine is alleged to be in. CR 5. But the rest of the record reveals that the indictment was amended at the defense request to allege Penalty Group 4. 3 RR 34, 114 (voir dire); 4 RR 140 (amended indictment admitted at trial); 5 RR 7 (amendment was at defense request); 5 RR 60 (closing argument).
[5] CR 17, 20; 5 RR 88 (guilty verdict); 6 RR 7 (plea of true); 6 RR 38 (punishment verdict). TEX. HEALTH & SAFETY CODE § 481.118(e) (5-99 years or life for possession of 400g or more of a Penalty Group 4 substance); TEX. PENAL CODE § 12.42(d).

evidence.[6]

STATEMENT OF PROCEDURAL HISTORY

The court of appeals issued its opinion on March 6, 2020. No motion for rehearing was filed. This Court granted the State an extension of time to file this petition by May 6, 2020.

GROUNDS FOR REVIEW

(1) When the State alleges, but fails to prove, the codeine mixture the defendant possessed contains a sufficient proportion of another medicine to be medicinal, should he be acquitted?

(2) Alternatively, if it is an element the State had to prove, is the evidence sufficient to meet that standard if it establishes the mixture smelled like cough syrup, contained another medicine commonly found in cough syrups, and was more than a trace amount?

ARGUMENT

The statutes

Codeine falls into three penalty groups. This mirrors the classification of codeine-containing mixtures in the federal drug schedules, which are tiered

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[6] *Biggers v. State*, __ S.W.3d ___, No. 07-18-00374-CR, 2020 WL 1146711, at *5 (Tex. App.—Amarillo Mar. 6, 2020).

depending on their relative risk and danger of addiction and abuse.[7] The lowest tier, PG-4, consists of:

> a compound, mixture, or preparation containing limited quantities of ["not more than 200 milligrams of codeine per 100 milliliters or per 100 grams"] that includes one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer on the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the [codeine] alone.[8]

This definition sets out two qualitative[9] components: a codeine concentration (at or under 200mg/100mL) and a description of another active ingredient (a sufficient

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[7] 21 U.S.C. § 812.

[8] TEX. HEALTH & SAFETY CODE § 481.105. This is the same language as in federal Schedule V. 21 C.F.R. § 1308.15(c)(1). Even though this codeine mixture is a Schedule V drug, federal law, unlike Texas, does not require a prescription for it. 21 C.F.R. § 290.1 (general requirement of prescription), 290.2 (exemption for this compound); *see also* Amendment of Regulations Regarding Certain Label Statements on Prescription Drugs, 65 FR 18934-01, 2000 WL 357336, April 10, 2000 ("Small amounts of codeine in combination with other nonnarcotic active medicinal ingredients, for example, cough syrup with codeine, may be marketed OTC under a final monograph for cold and cough products."). While the Federal Food, Drug, and Cosmetic Act generally pre-empts state law, it does not do so for state laws that require a prescription. 21 U.S.C.A. § 379r(c)(1)(B). Texas requires such a prescription for Schedule V-codeine containing 200mg or less of codeine. TEX. HEALTH & SAFETY CODE § 481.074(i) (cited in *Miles*, 357 S.W.3d at 639 n.2 (Cochran, J., concurring)).

[9] *See Dudley v. State*, 58 S.W.3d 296, 297-98 (Tex. App.—Beaumont 2001, no pet.) (distinguishing between quantity or weight of codeine and the qualitative properties that distinguish the codeine penalty groups).

proportion to itself make the mixture medicinal). This is essentially a description of codeine cough syrup.[10]

The middle-tier, PG-3, sets out a higher codeine concentration and a requirement that the active ingredient be at therapeutic levels:

> a material, compound, mixture, or preparation containing limited quantities of . . . not more than 1.8 grams of codeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;[11]

Tylenol with codeine #3 and #4 tablets would fall into this tier.[12]

PG-1 is the remainder:

> a salt, compound, derivative, or preparation of opium or opiate, other than thebaine derived butorphanol, nalmefene and its salts, naloxone and its salts, and naltrexone and its salts, but including . . . Codeine not listed in Penalty Group 3 or 4[.][13]

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[10] *Miles*, 357 S.W.3d at 636-37.

[11] TEX. HEALTH & SAFETY CODE § 481.104(a)(4). It also prohibits possession of the same concentration of codeine with an equal or greater quantity of isoquinoline alkaloid of opium. Both variations of PG-3 codeine mirror the language in federal Schedule III. 21 C.F.R. § 1308.13(e)(1)(ii).

[12] *Miles*, 357 S.W.3d at 640 (Cochran, J., concurring). *See* Package Insert for Tylenol with Codeine, Janssen Pharmaceuticals (available online at http://www.janssenlabels.com/package-insert/product-monograph/prescribing-information/TYLENOL+WITH+CODEINE-pi.pdf (describing Codeine in combination with acetaminophen as a Schedule III controlled substance).

[13] TEX. HEALTH & SAFETY CODE § 481.102(3)(A). This corresponds to federal Schedule II drug, which similarly excepts out substances that are "listed in another schedule." 21

Set on top of this tiered structure is a range of punishments that depend, as with other controlled substances, on whether the codeine or codeine mixture is delivered or merely possessed and its weight, including adulterants and dilutants.[14]

The indictment

Appellant was indicted for:

> intentionally and knowingly possess[ing] a Penalty Group 4 controlled substance, namely, a compound, mixture or preparation in an amount of 400 grams or more, that contained not more than 200 milligrams of codeine per 100 milliliters or 100 grams and one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer on the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone.[15]

The offense facts

Police stopped the vehicle Appellant was in, anticipating they would find the methamphetamine that an informant had arranged to buy from him.[16] Instead, they found a Styrofoam cup and Sprite bottle both containing what they believed was

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C.F.R. § 1308.12(b)(1)(i). As compared to Schedule III or V drugs, Schedule II drugs have a higher potential for abuse and when abuse occurs may lead to severe psychological or physical dependence. 21 U.S.C. § 812(b)(1).

[14] TEX. HEALTH & SAFETY CODE §§ 481.114 (prohibiting manufacturer or delivery of PG-3 or 4); 481.115 (prohibiting possession of PG-1 substance without a prescription), 481.117 (same for PG-3 substance); 481.118 (same for PG-4 substance).

[15] DX 1.

[16] 4 RR 35, 51, 74, 77 175, 190, 193; 5 RR 38-39; SX 2-1.

"lean," a drink containing codeine and cough syrup mixed with Sprite, juice, or something similar.[17] When asked who the "lean" belonged to, Appellant said he "had a prescription for the cough syrup," switched to claiming it was over-the-counter Robitussin made to look like lean, and finally asked whether they could just pour it out.[18] It field-tested positive for codeine.[19] Later, in a jail phone call admitted at trial, Appellant admitted to having a "cup of lean in the car" and "a Sprite …with some lean in it."[20]

The analyst's testimony

At trial, the lab analyst testified that codeine and promethazine were both present in each of the seized liquids, but their relative amounts were not quantified.[21] She testified that the liquids smelled like cough syrup,[22] that codeine and

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[17] 4 RR 78-79, 87. "Lean is so named because of the effect it has on people while drinking– they tend to slouch or *lean* to one side the more they consume." Destiny Bezrutczyk, "What is a Lean Addiction?" addiction.center.com (Dec. 2019) (online at https://www.addictioncenter.com/opiates/codeine/lean-addiction-abuse/). The reason it is mixed with soft drinks may be because, as one user explained, "you can't drink it straight; it tastes nasty!" "Leaning on syrup: The misuse of opioid cough syrup in Houston," Texas Commission on Alcohol and Drug Abuse, p.11 (Dec. 1999) (available online at: https://socialwork.utexas.edu/dl/files/cswr/institutes/ari/pdf/sippingonsyrup.pdf/).

[18] 4 RR 80-81.

[19] 4 RR 82, 104.

[20] SX 12-2 at 4:34.

[21] 4 RR 121, 139-40; SX 9 (lab report).

[22] 4 RR 120, 132-34, 142.

promethazine are often paired together in cough syrups,[23] and that promethazine is an antihistamine and is a non-narcotic, active medicinal ingredient.[24] As to whether the promethazine conferred valuable medicinal qualities on this particular mixture, she could only testify that it appeared to and that she assumed it was there for a reason.[25]

The court of appeals

The court of appeals agreed with Appellant that proving that the mixture contained some amount of codeine and promethazine was not sufficient to sustain a conviction. It concluded there had to be evidence the codeine concentration was not more than 200mg/100ml and that the proportion of promethazine was sufficient to convey valuable medicinal qualities.[26] The first conclusion is obviously wrong, as

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[23] 4 RR 123, 135.
[24] 4 RR 123, 134-35, 141.
[25] 4 RR 136.
[26] *Biggers*, 2020 WL 1146711, at *5 (the analyst "failed to establish the concentration level of the codeine was not more than 200 milligrams of codeine per 100 milliliters, and she did not establish the presence of promethazine in a sufficient proportion to convey on the mixture 'valuable medicinal qualities' other than those possessed by the codeine alone. Furthermore, these two essential elements were not established by the testimony of any other witness.").

the court of appeals itself recognized in a footnote.[27] The second conclusion has been the subject of much debate and should be resolved by this Court.

ISSUE ONE

> When the State alleges, but fails to prove, the codeine mixture the defendant possessed contains a sufficient proportion of another medicine to be medicinal, should he be acquitted?

The court of appeals is not alone in its conclusion.

The court of appeals has support for its conclusion that the "sufficient proportion to confer…medicinal qualities" language of PG-4 is an element the State must prove. The plain language of that statute in isolation suggests as much.[28] Judge

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[27] *Id*. at *5 n.10 ("A compound, mixture, or preparation containing the mere presence of codeine, presumptively contains *at least* 'not more than 200 milligrams of codeine per 100 milliliters.' While the compound, mixture or preparation might also contain *more* than 200 milligrams of codeine per 100 milliliters, as to that element of the offense, the evidence is <u>not</u> insufficient if it merely establishes the presence of codeine in a substance alleged to be a Penalty Group 4 controlled substance.") (all emphasis in original). As the lab analyst testified, a concentration higher than the maximum threshold for PG-4 codeine would have made the substance a higher penalty group. 4 RR 140-41, 146-47.

[28] This, of course, is not definitive; statutory defenses, for example, are written as if the defendant has the burden of proof. TEX. PENAL CODE § 9.22 (necessity: "Conduct is justified if …the actor reasonably believes the conduct is immediately necessary to avoid imminent harm); TEX. PENAL CODE § 9.31 (self-defense: "a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force.").

Cochran in her concurrence in *Miles* also spelled out that it should be alleged and proven:

> So when the State wants to charge a defendant with unauthorized possession of regular prescription 'cough syrup,' [the language of the PG-4 codeine statute] is what it should both plead and prove. The indictment should allege all that verbiage, the jury charge should include all that verbiage, and a witness must testify that the substance analyzed fits that lengthy definition.[29]

But other factors also suggest this language is really only an element (and an element to negate) for PG-1 codeine.

Because PG-4 codeine is structured as a mitigation of PG-1 codeine, acquittal is an odd remedy.

Usually, as the severity of a set of tiered offenses increases, the State is required to prove more. Codeine possession is partly structured like this. Up to 200 mg/100mL concentrations of codeine is the lowest tier, up to 18000 is the middle tier, and above that amount is the highest. But an extra fact placed on the lesser offense—here, a sufficient proportion of medication to confer medicinal qualities—presents difficulties. If PG-1 had not been defined as "Codeine not listed in Penalty Group 3 or 4," this extra fact would likely eliminate the stacked structure and prevent

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[29] *Miles*, 357 S.W.3d at 639 (Cochran, J., concurring) (citations and other footnotes omitted).

PG-1 codeine from being a greater of PG-4. They would just be different offenses with different requirements, and a failure to prove one element would justifiably result in acquittal.

But PG-1 is defined as not PG-4. So while it will not always be a greater offense of PG-4 codeine,[30] where the mixture contains a medicinal ingredient like promethazine, it will be. This is implicit in *Miles*, which held that to prove PG-1 codeine, the State must negate PG-4 codeine; it must prove an insufficient proportion of promethazine to be medicinal.[31] PG-1's negation of PG-4's mitigating factor establishes the structure of a greater and lesser offense.[32] Because every alternative is criminalized, there is no no-man's land where codeine mixed with promethazine is not an offense. Even where there is a problem of proof and the State's evidence fails to distinguish between PG-1 codeine and PG-4 codeine, the State has established beyond a reasonable doubt that Appellant is guilty of possession of

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[30] The State can also prove PG-1 codeine with proof of a codeine concentration higher than 1.8g/100mL.

[31] 357 S.W.3d at 636-37. The *Miles* majority declined to decide if the State had proven the lesser of PG-3 or PG-4 codeine possession because the law at the time still required the State to have requested a lesser before reformation was possible. *Id.*, at 633 n.13 (citing reformation law at the time), at 645 (Keller, P.J., dissenting) (explaining that issue whether to change reformation law was pending at the time); *Bowen v. State*, 374 S.W.3d 427 (Tex. Crim. App. 2012) (changing law).

[32] *Sanchez*, 275 S.W.3d at 906 (Keller, P.J., concurring).

codeine.[33] In this context, Appellant's argument—"acquit me because I'm even guiltier than the State alleged"—has bothered a majority of the judges on this Court[34] and still should. Courts in other states have come to similar conclusions about the non-element status of Schedule V's codeine qualifiers under statutes that, like Texas, are also modeled on the federal drug schedules.[35]

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[33] Before the 1974 Penal Code made it no defense to a prosecution for criminal attempt that the offense actually was committed, TEX. PENAL CODE § 15.01(c), this Court similarly held that proof of a consummated burglary should not result in an acquittal for the charged offense of attempted burglary. *Flores v. State*, 472 S.W.2d 146, 148 (Tex. Crim. App. 1971) (citing *State v. Mathis*, 221 A.2d 529, 533 (N.J. 1966)); *Nielson v. State*, 437 S.W.2d 862, 866 (Tex. Crim. App. 1969) ("What sensible end can be served by the bald proposition that when the indictment alleges only an 'attempt' there must be an acquittal if the evidence shows the accused went further than the State charged.") ("The fact that an accused is guilty of a higher offense than alleged should be no defense, and it should not be open to him to object that he has not been indicted for the greater offense."); *see also* 1925 Penal Code art.14.02 (criminalizing attempt at burglary, which required "endeavor to accomplish" "but falling short of the ultimate design").

[34] *Sanchez*, 275 S.W.3d at 906 (Keller, P.J., concurring), 908 (Johnson, concurring) ("If the chemist had, in fact, ascertained the proportion of promethazine, it may have been too small to satisfy the statute and thereby enable the state to seek a greater punishment."); *Miles*, 357 S.W.3d at 644-45 (Keller, P.J., dissenting) (arguing that a majority of the court in *Sanchez*, when Judge Johnson's concurrence is considered, found that "failure to prove the proportion of promethazine does not render the evidence legally insufficient to support a conviction for an offense involving codeine under Penalty Group 4."); 5 RR 75-76 (prosecutor at trial arguing it was ridiculous to acquit Appellant for believing he may have had a purer form of codeine).

[35] *See Evans v. State*, 766 S.E.2d 821, 825 (Ga. Ct. App. 2014) (rejecting defense request to submit an instruction that tracked definition of Schedule V codeine as alleged in the indictment because it was not a defense to codeine possession); *People v. Valdez*, 56 P.3d 1148, 1152 (Colo. App. 2002) (finding evidence insufficient to prove higher penalty group but not Schedule V); *but see People v. Jones*, 425 N.E.2d 1279, 1283 (Ill. App. Ct. 1981)

It should not make a difference that, here, the State's indictment alleged more than it had to—that a nonnarcotic active medicinal ingredient in the mixture was in the sufficient proportion.[36] This allegation should not be incorporated into the hypothetically correct jury charge against which sufficiency is measured. Although Appellant certainly relied on the allegation,[37] neither this fact nor the allegation's status as "statutory"[38] alter the legal effect of this failure of proof—it still establishes Appellant's guilt, not his innocence.

ISSUE TWO

> Alternatively, if it is an element the State had to prove, is the evidence sufficient to meet that standard if it establishes the mixture smelled like cough syrup, contained another medicine commonly found in cough syrups, and was more than a trace amount?

This record is not like *Sanchez,* but it should still be sufficient.

If proof of the PG-4 language is required, the evidence is still sufficient.

(finding presence of codeine alone was insufficient to prove Schedule V codeine possession).

[36] DX 1.

[37] This was the basis of his motion for directed verdict, 5 RR 5-7, and part of his argument before the jury, 5 RR 61-63.

[38] *Geick v. State*, 349 S.W.3d 542, 548 (Tex. Crim. App. 2011) (statutory definitions that narrow the manner and means in which an offense may be committed must be proven when unnecessarily pled).

Sanchez upheld a conviction for PG-4 codeine possession despite no quantification of the amount of promethazine in the substance, but, according to the court of appeals, it did so based on testimony that is absent in this case.[39] The *Sanchez* analyst testified:

> Q. Since you don't have enough information to quantify how much Promethazine was in that solution, you cannot testify to the jury and tell them whether or not the Promethazine had a valuable medicinal quality, can you?
>
> A. Yes. Promethazine has been identified in this syrup.
>
> Q. And Promethazine on its own has a valuable medicinal quality, doesn't it?
>
> A. It has.[40]

This Court seems to have understood this not just as testimony that promethazine in general has valuable medicinal qualities but that "the Promethazine in the substance" being tested imparted "a valuable medicinal quality."[41] In holding this evidence sufficient, this Court noted that the analyst did *not* testify that the lack of

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[39] *Sanchez*, 275 S.W.3d at 905; *Biggers*, 2020 WL 1146711, at *6 (explaining *Sanchez* as holding that "the State was not required to quantify the amount of promethazine in the substance tested so long as the expert could testify as to the qualitative property of the compound, mixture, or preparation").

[40] *Sanchez*, 275 S.W.3d at 903.

[41] 275 S.W.3d at 905.

quantification made him unable to say whether the promethazine conferred valuable medicinal qualities.[42]

The testimony that the court of appeals found insufficient is likely more representative of that in other cases.[43] When asked if there was enough of the promethazine to have some effect medicinally, the analyst said that "it appear[ed] to, but [she could not] say for sure."[44] She testified that promethazine certainly can have a medicinal quality; it was not an inert substance like sugar or food coloring.[45] She assumed it was there for a reason and could say it was "prevalent" in the liquid because its gas chromatography peak was nearly even with that of the codeine.[46] But she was unable to testify outright that there was enough promethazine in the mixture to impart a valuable medicinal quality to it:

> *Q.* Your training does not allow you, nor your degree, nor your training, nor your experience would allow you to say that there was a medicinal quantity of promethazine in that mixture, can you?

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[42] *Id.*

[43] *Cf. Miles*, 357 S.W.3d at 638 (recounting analyst's testimony that promethazine "is most often found with codeine" and "is an antihistamine," and agreement with prosecutor that "if you were to go see the doctor and you got prescribed codeine and promethazine, there's a pain element in there as far as a reduction of pain and also an antihistamine working together.").

[44] 4 RR 136.

[45] 4 RR 134.

[46] 4 RR 134-36.

A. No, I cannot.

….

Q. You have no training and no expertise that would allow you to say that there was enough promethazine in this mixture to impart a valuable medicinal quality to it?

A. Correct, all that I know that it is an antihistamine.[47]

Although this testimony differs from that in *Sanchez*, it should still be sufficient. As explained in the next section, the standard does not require jurors to share the analyst's need for scientific certainty.

Conferring valuable medicinal qualities is a low standard.

It is tempting to treat PG-4's "sufficient proportion to confer…valuable medicinal qualities" as something similar to PG-3's "recognized therapeutic amounts."[48] But the standards are quite different. The former standard originates from a 1916 regulatory decision interpreting one of the nation's first drug control laws, the Harrison Narcotics Act.[49] The Act created an exemption from regulation

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[47] 4 RR 139, 141.

[48] *See, e.g., Sanchez,* 275 S.W.3d at 907 (Johnson, J., concurring) ("Translated from the English, the [PG-4 codeine] statute requires that the mixture have enough of the non-narcotic active ingredient that the non-narcotic is at a therapeutic level."); *Dudley*, 58 S.W.3d at 300 n.6 (admitting to not being on "safe footing" in comparing the standards but suggesting that they must not have identical meanings).

[49] Harrison Narcotics Act of 1914, 38 Stat. 785 (repealed 1970). Passed as a revenue measure, it regulated narcotics by requiring registration and assessing taxes. *Gonzales v.*

for remedies that contained small amounts of opium, codeine, and a few other drugs.[50] Treasury Decision 2309 explained:

> Preparations and remedies within the intent of section 6 are hereby defined to be ready-made compound mixtures prepared in accordance with a recognized or established formula as indicated above, which contain not more than one of the enumerated drugs in a quantity not greater than that specified, together with other active medicinal drugs in sufficient proportion to confer upon such preparations and remedies valuable medicinal qualities other than possessed by the narcotic drugs if dispensed alone. Simple dilutions of a narcotic drug made by admixture with inert or nearly inert susbtances [sic], as sugar of milk or simple solutions of narcotic drugs in water, sirup, diluted alcohol, flavoring matter, etc., are not bona fide medicinal preparations within the meaning of the exemption.[51]

This language was brought forward through the modern federal drug schedules and

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Raich, 545 U.S. 1, 10 (2005). As a tax law, the Department of the Treasury served as the federal government's primary enforcer, *id*., and the Commissioner of Internal Revenue was given authority to create regulations for carrying the provisions of the act into effect. Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483, 568 n.181 (1997).

[50] 38 Stat. 785 at § 6 ("the provisions of this Act shall not be construed to apply to the sale, distribution, or giving away, dispensing, or possession of preparations or remedies which do not contain … more than one grain of codeine…; Provided, that such remedies and preparations are sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this Act.").

[51] T.D. 2309, Interpretation of section 6 of the act of December 17, 1914, W.H. Osborn, Commissioner of Internal Revenue (Treasury Department Mar. 11, 1916), *reprinted in* Treasury Decisions under Internal-Revenue Laws of the United States, January-December 1916, Vol. 18 at p. 45 (Government Printing Office 1917), available online at https://hdl.handle.net/2027/uc1.a0001809318?urlappend=%3Bseq=681).

into Texas law.[52] But it is not modern language, and it is certainly not a stringent standard. A contemporaneous encyclopedia applied the term "valuable medicinal quality" to describe part of what juniper berries confer on gin.[53] Even today's definition of "medicinal"—"tending or used to cure disease or relieve pain"[54]—does not suggest that testimony from a pharmacologist would be necessary. Nor does the phrase "sufficient proportion" suggest precision is needed, especially given the phrase's origin long before the invention of the gas chromatography and mass spectrometry. The standard is nothing more than that the mixture or compound should be something a rational person would use to treat an ailment, not a mixture masquerading as something medicinal.

"Lean" initially appears to present a special problem because, by design, it is a combination of cough syrup and some other substance, concocted for abuse and not a legitimate medical purpose. But under the Texas Controlled Substances Act,

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[52] 21 C.F.R. § 1308.15(c) (Schedule V); TEX. HEALTH & SAFETY CODE § 481.105(1).

[53] "Gin," 1911 Encyclopedia Britannica, available online at https://en.wikisource.org/wiki/1911_Encyclop%C3%A6dia_Britannica/Gin ("The invention of juniper wine, no doubt, led some one [sic] to try the juniper berry for this purpose, and as this flavouring agent was found not only to yield an agreeable beverage, but also to impart a valuable medicinal quality to the spirit..").

[54] "Medicinal," Merriam-Webster.com (available online at https://www.merriam-webster.com/dictionary/medicinal).

these other substances are adulterants and dilutants.[55] The mixture that the promethazine must have given valuable medicinal qualities to does not include the Sprite or whatever else may have been added to make the drink palatable. The analyst here admitted she did not know if the liquid she tested originally came from a medicine produced by a pharmaceutical manufacturer.[56] But her testimony is still enough to infer that a cough medicine was initially involved. She testified that it smelled like cough syrup, contained promethazine as cough syrups do, and that it was "prevalent" in the liquid she tested (*i.e.*, it wasn't a mere trace amount). Like the analyst, the jury would have been rational to infer it was there for some purpose, specifically to function as an antihistamine.

Jurors know from their own experience in taking medication with other liquids that the mere presence of other substances in a mixture will not stop a medicine from conveying its healing properties. Something that generally has valuable medicinal qualities will continue to impart those qualities on a mixture so long as there is not another substance that would chemically negate it. The evidence here was thus sufficient.

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[55] *Seals v. State*, 187 S.W.3d 417, 420 (Tex. Crim. App. 2005) (interpreting TEX. HEALTH & SAFETY CODE § 481.002(49)).
[56] 4 RR 143.

More importantly, any proof otherwise (that it was not derived from cough medicine and thus potentially more dangerous) would only establish a higher penalty group. This Court should grant review.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant this petition, reverse the judgment of the court of appeals, and affirm Appellant's sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 4,258 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 6th day of May 2020, the State's Petition for Discretionary Review was served electronically on the parties below.

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APPENDIX

Court of Appeals's Opinion

2020 WL 1146711
Only the Westlaw citation is currently available.

Court of Appeals of Texas, Amarillo.

Darren Lamont BIGGERS, Appellant
v.
The STATE of Texas, Appellee

No. 07-18-00374-CR, No. 07-18-00375-CR
|
March 6, 2020

Synopsis

Background: Defendant was convicted in the 235th District Court, Cooke County, Jim Hogan, J., presiding by assignment, of possession of codeine, a Penalty Group 4 controlled substance, in an amount over 400 grams, and of tampering with physical evidence, and was sentenced to 60 years and 99 years, respectively, with the two sentences to be served concurrently. Defendant appealed.

Holdings: The Court of Appeals, Pirtle, J., held that:

evidence was legally insufficient to establish that substance found in defendant's vehicle was a Penalty Group 4 controlled substance, and

State presented sufficient evidence to corroborate defendant's extrajudicial incriminating statement, so as to establish that defendant altered, concealed, or destroyed an unknown substance with intent to impair its availability as evidence.

Affirmed in part, and reversed and rendered in part.

On Appeal from the 235th District Court, Cooke County, Texas, Trial Court Nos. CR17-00072 & CR17-00073; Honorable Jim Hogan, Presiding by Assignment

Attorneys and Law Firms

Eric Erlandson, for Appellee.

Jeromie Oney, for Appellant.

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

OPINION

Patrick A. Pirtle, Justice

***1** Appellant, Darren Lamont Biggers, appeals from his convictions by jury of the offenses of (1) possession of a Penalty Group 4 controlled substance (codeine), in an amount over 400 grams, [1] and (2) tampering with physical evidence. [2] The jury assessed Appellant's sentence in each case at confinement for a term of sixty years and ninety-nine years, respectively, with the two sentences to be served concurrently. [3] Appellant challenges his convictions through two issues contending the evidence is legally insufficient to support his conviction for (1) possession of a controlled substance, Penalty Group 4, over 400 grams, and (2) tampering with evidence. We reverse and render a judgment of acquittal as to the possession of a controlled substance offense and we affirm the tampering with evidence offense. [4]

1 Trial Court Cause Number CR17-00073; Appellate Cause Number 07-18-00375-CR; TEX. HEALTH & SAFETY CODE ANN. § 481.118(a) (West 2017). An offense under this section is punishable by imprisonment for life or for a term of not more than 99 years or less than 5 years, and a fine not to exceed $50,000. *Id.* at § 481.118(e).

2 Trial Court Cause Number CR17-00072; Appellate Cause Number 07-18-00374-CR; TEX. PENAL CODE ANN. § 37.09(a)(1) (West 2019). As indicted, as offense under this section is a third degree felony. *Id.* at § 37.09(c).

3 In addition to the primary offenses, as to each indictment, Appellant pleaded "true" to two prior felony offense enhancement paragraphs set forth in the indictment, with the second prior felony offense being for an offense committed subsequent to the first prior felony offense having become final. As a result, each offense was punishable by imprisonment for life or for any term of years of not more than 99 years or less than 25 years, without the possibility of a fine. TEX. PENAL CODE ANN. § 12.42(d) (West 2019).

4 Originally appealed to the Second Court of Appeals, these appeals were transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between precedent of the Second Court of Appeals and this court on any relevant issue, these appeals will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

BACKGROUND

Appellant's prosecution for these offenses stems from a drug investigation involving a confidential informant. A man who had been arrested for an unrelated crime told officers of the Cooke County Sherriff's Department that he could purchase methamphetamine from Appellant, a known drug trafficker. Acting as a confidential informant and in the presence of the investigating officers, the man made a phone call to Appellant. The phone call was recorded. During that call, the confidential informant made arrangements to meet Appellant on the side of a local Dollar General store and purchase $50 worth of methamphetamine. [5] In court, the officer identified the voices on the recording as those of Appellant and the confidential informant and the recording was introduced into evidence.

5 In the call, the parties made reference to purchasing "ice cream," a term identified by the investigating officer as a "street word" for methamphetamine.

***2** After making the call, officers and the informant drove around the Dollar General store until the informant told officers he had seen Appellant. Just as he had described in the phone call, Appellant was sitting in the passenger seat of a vehicle parked at the side of the building. Another individual was sitting in the vehicle with him. The officer with the confidential informant told another officer to make contact with Appellant because they had credible information he was going to be involved in a drug transaction. The other officer did as instructed and Appellant was temporarily detained "for a narcotics investigation."

When the investigating officer approached the vehicle, "the very first thing [he] noticed ... was the overwhelmingly [sic] smell of marijuana...." He then saw "a Sprite bottle and a white Styrofoam cup, both in the center console ... filled with a purple-type substance." The officer "immediately believed ... that it was possibly 'lean,' which is codeine cough syrup that people put in other drinks...." According to testimony admitted at trial, codeine is a scheduled narcotic drug that is "[v]ery much" abused when it is mixed in this manner. When questioned, Appellant admitted the substance was "lean" and he offered to just pour it out since it belonged to his grandmother. He also stated, alternatively, both that he had a prescription for it and it was an over-

the-counter medication. Subsequent field testing of the substance, with a field test kit specifically designed for lean, revealed that substance tested positive for codeine.

Based on this information, Appellant was arrested for possession of a controlled substance. A subsequent search of the vehicle revealed no methamphetamine, no other drug paraphernalia, no baggies or containers, and no drug residue. The only item the searching officer found that seemed out of place was a "hundred dollars laying in the [passenger-side] floorboard...." [6] In one of Appellant's jail phone calls, made six days after his arrest, he stated that the person in the vehicle with him was also going to buy some methamphetamine from him, but he "ate everything." An investigating officer testified that Appellant was "referencing ingesting narcotics orally." The officer stated that Appellant said he "ate everything" when he saw the police block them in and he testified that people "often" eat drugs to get rid of them. Another officer testified that when he first approached the vehicle, he saw movement in the vehicle that "could have" been consistent with someone swallowing a baggie of methamphetamine.

6 At trial, the officer described it as "a hundred-dollar bill folded three ways in the floorboard of the vehicle. It was just kind of out of place laying there, a hundred dollars in the floorboard."

The jury found Appellant guilty as charged in each indictment and, after a separate punishment hearing, assessed his punishment as previously noted. Appellant timely filed his notice of appeal.

STANDARD OF REVIEW

In a sufficiency review, we examine the evidence to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (citing *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). *See also Adames v. State*, 353 S.W.3d 854, 859 (Tex. Crim. App. 2011). In determining whether the evidence is legally sufficient to support a conviction, this court considers all the evidence in the light most favorable to the verdict and determines whether, based on that evidence and reasonable inferences to be drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Queeman v. State*, 520 S.W.3d 616, 623 (Tex. Crim. App. 2017).

***3** The fact finder is the sole judge of the credibility of the witnesses and the weight to be given to their testimonies, and a reviewing court must defer to those determinations and not usurp the fact finder's role by substituting its judgment for that of the jury. *Id.* (citing *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012)). In doing so, we give deference to the responsibility of the fact finder to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016). Faced with a record supporting contradicting inferences, a reviewing court must presume that the fact finder resolved any such conflicts in favor of the verdict, even if not explicitly stated in the record. *Queeman*, 520 S.W.3d at 622. Each fact need not point directly and independently to the appellant's guilt, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Id.* "The duty of the reviewing court is simply to ensure that the evidence presented supports the jury's verdict and that the State has presented a legally sufficient case of the offense charged." *Id.* "Under this standard, evidence may be legally insufficient when the record contains either no evidence of an essential element, merely a modicum of evidence of one element, or if it conclusively establishes a reasonable doubt." *Britain v. State*, 412 S.W.3d 518, 520 (Tex. Crim. App. 2013) (citing *Jackson*, 443 U.S. at 320, 99 S.Ct. 2781).

Legal sufficiency of the evidence is measured against the elements of the offense as defined by a hypothetically correct jury charge. *Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014) (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). Such a charge would be one that accurately sets out the law, is authorized by the indictment, does not unnecessarily restrict the State's theories of guilt, and adequately describes the particular offense for which the defendant was tried. *Gollihar v. State*, 46 S.W.3d 243, 253 (Tex. Crim. App. 2001); *Malik*, 953 S.W.2d at 240. In our review, we must evaluate all of the evidence in the record, both direct and circumstantial, regardless of whether that evidence was properly or improperly admitted. *Jenkins*, 493 S.W.3d at 599; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

POSSESSION OF A CONTROLLED SUBSTANCE

Codeine is a controlled substance, appearing in multiple penalty groups, depending on the concentration of the substance. Relevant to the facts of this case, Penalty Group 4 consists of "a compound, mixture, or preparation containing limited quantities of [codeine] that includes one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer on the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the [codeine] alone: not more than 200 milligrams of codeine per 100 milliliters or per 100 grams." TEX. HEALTH & SAFETY CODE ANN. 481.105(1) (West Supp. 2019); *Miles v. State*, 357 S.W.3d 629, 633 (Tex. Crim. App. 2011).

"[A] person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 4, unless the person obtained the substance directly from or under a valid prescription or order of a practitioner acting in the course of practice." TEX. HEALTH & SAFETY CODE ANN. § 481.118(a) (West 2017); *Dudley v. State*, 58 S.W.3d 296, 298 (Tex. App.—Beaumont 2001, no pet.) (describing the placement of codeine in three separate penalty groups, with the distinguishing factor being particular qualitative properties). [7]

7 Penalty Group 1 includes "[o]pium and opiate not listed in Penalty Group 3 or 4, and a salt compound, derivative, or preparation of opium or opiate, other than thebaine derived butorphanol, nalmefene and its salts, naloxone and its salts, and naltrexone and its salts, but including ... Codeine not listed in Penalty Group 3 or 4...." TEX. HEALTH & SAFETY CODE ANN. § 481.102(3)(A) (West Supp. 2019).
Penalty Group 3 includes "a material, compound, mixture, or preparation containing limited quantities of the following narcotic drugs, or any of their salts ... not more than 1.8 grams of codeine, or any of its salts, per 100 millimeters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium...." TEX. HEALTH & SAFETY CODE ANN. § 481.104(a)(4) (West Supp. 2019).
Penalty Group 4 includes "a compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs that includes one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer on the compound, mixture, or preparation valuable medical qualities other than those possessed by the narcotic alone: not more than 200 milligrams of codeine per 100 milliliters or per 100 grams...." TEX. HEALTH & SAFETY CODE ANN. § 481.105(1) (West 2017).

ANALYSIS—ISSUE ONE

***4** As relevant to the indictment and facts presented, in order to affirm a conviction for possession of a Penalty Group 4 controlled substance, 400 grams or more, the State was required to prove (1) Appellant (2) knowingly or intentionally (3) possessed (4) more than 400 grams of a compound, mixture, or preparation (5) containing not more than 200 milligrams of codeine per 100 milliliters, (6) that also contained one or more nonnarcotic active medicinal ingredients (7) in a sufficient proportion to confer on the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the codeine alone. TEX. HEALTH AND SAFETY CODE ANN. §§ 481.105(1); 481.118(a) (West 2017 and West Supp. 2019).

Under section 481.105(1) of the Texas Health and Safety Code, in order for possession of the compound, mixture, or preparation to be an offense classified as a Penalty Group 4 controlled substance, the concentration level of the codeine must be "not more than 200 milligrams of codeine per 100 milliliters or per 100 grams." *Id.* at § 481.105(1). Similarly, the mere presence of a nonnarcotic active medicinal ingredient is not sufficient to establish that the compound, mixture, or preparation is a Penalty Group 4 controlled substance; rather, the nonnarcotic active medicinal ingredients must be in a sufficient proportion to convey on the mixture "valuable medicinal qualities" other than those possessed by the codeine alone. *Id.* In addition, while the State is not required to prove the precise quantitative amount of the codeine or the adulterants and dilutants, it is required to prove that the aggregate weight of the compound, mixture, or preparation, including adulterants, if any, equals or exceeds the minimum weight for the offense charged. *Sanchez v. State*, No. 01-06-00210-CR, 2010 WL 2545574 at *9, 2010 Tex. App. LEXIS 4857 at *24 (Tex. App.—Houston [1st Dist.] June 24, 2010, no pet.) (mem. op., not designated for publication) (citing *Melton v. State*, 120 S.W.3d 339, 344 (Tex. Crim. App. 2003)). Weights and concentrations are, however, entirely different quantitative measurements and, where required by statute, the State must establish each element separately beyond a reasonable doubt.

Here, the State submitted to the Texas Department of Public Safety Crime Laboratory for testing a box containing two items —later identified as State's Exhibit 7 and State's Exhibit 8. The chemist proffered by the State as its expert witness testified that when she opened the two items found in the box, they both "had a similar odor to cough syrup or something of the like." From there she performed two presumptive tests on each item—a Marquis Color Test and a UV Scan. The results from both tests, as to both items, were "inconclusive." From there, the chemist performed a gas chromate-graph/mass spectrometer (GC/MS) test to determine that both Exhibits 7 and 8 contained the presence of codeine and promethazine. The report of the chemist was introduced indicating that the first item was a plastic bottle that contained a clear liquid weighing 654.97 grams (+/- 0.04 grams) net weight, containing an unspecified amount of codeine and promethazine, and that the second item was, likewise, a plastic bottle that contained a clear liquid weighing 327.57 grams (+/- 0.04 grams) net weight, containing an unspecified amount of codeine and promethazine. Without objection, the chemist further testified that codeine and promethazine are usually seen together in common cough syrups. When the State's attorney asked the chemist whether the liquid contents in Exhibits 7 and 8 "contain not more than 200 milligrams of codeine per 100 milliliters," the defense attorney objected before the witness could answer. At that point, the trial court allowed defense counsel to take the witness on voir dire.

***5** On voir dire, the chemist stated the DPS Crime Lab did not perform a "quantitative test" to determine the concentration of codeine in the two samples because it was not asked to perform such an analysis. Instead, it was asked simply to "examine for the presence of a controlled substance," which it did. As such, the chemist candidly admitted that she did not know and could not testify to the concentration level of the codeine in either sample. Following voir dire, the trial court overruled defense counsel's objection, whereupon the State's counsel asked the chemist whether she had ever performed "these tests" on common cough syrup and whether cough syrup contained more than 200 milligrams of codeine per 100 milliliters. Again, the chemist emphasized that she could not testify as to the concentration of codeine in the test samples at issue, but offered the non-responsive, completely speculative statement that cough syrup "labels do *usually* state that it is a Penalty Group 4 and that it has less than 200 and –." (Emphasis added). Before the witness could finish her answer, she was interrupted by State's counsel saying, "Okay. Has the -- not more than 200 milligrams of codeine per 100 milliliters?" To which, the chemist simply answered, "Yes."

In other testimony, the chemist told the jury that promethazine was a nonnarcotic active medicinal ingredient,[8] although she never opined as to whether the combination of promethazine and codeine had "valuable medicinal qualities" other than those possessed by the codeine alone. When the prosecutor asked if the liquid seized from Appellant had "valuable medicinal qualities, other than those possessed by the codeine alone," defense counsel's objection was again overruled by the trial court. After the prosecutor rephrased his question to ask, "[d]oes the promethazine add something to *this* mixture medicinally ..." the chemist simply answered, "It *appears* to, but *I can't say for sure.*" (Emphasis added).[9]

8 Independent Internet research establishes that promethazine is the generic form of the brand-name drug Phenergan and that it is used as an antihistamine, sedative, and anti-nausea drug. It belongs in a group of drugs called phenothiazines and it is not a narcotic. *See https://www.drugs.com/prometh-azine.html* (last visited March 2, 2020).

9 On voir dire examination, the chemist directly stated she did not know how much promethazine or codeine was in the substance she tested.

Based on this record, Appellant asserts the evidence presented was insufficient because the State was unable to provide any testimony establishing an essential element of the State's case, namely the level of concentration of codeine in the substances possessed by Appellant. Furthermore, Appellant contends the evidence was insufficient because the State only established the mere presence of promethazine, rather than the presence of promethazine in a sufficient proportion to the whole to confer on the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the codeine alone. We agree.

At best, the chemist stated the samples recovered from the vehicle in which Appellant was a passenger was a compound, mixture, or preparation containing 982.54 net grams of a substance that contained codeine and promethazine. That's it. She failed to establish the concentration level of the codeine was not more than 200 milligrams of codeine per 100 milliliters, and she did not establish the presence of promethazine in a sufficient proportion to convey on the mixture "valuable medicinal qualities" other

than those possessed by the codeine alone. Furthermore, these two essential elements were not established by the testimony of any other witness. [10]

10 A compound, mixture, or preparation containing the mere presence of codeine, presumptively contains *at least* "not more than 200 milligrams of codeine per 100 milliliters." While the compound, mixture or preparation might also contain *more* than 200 milligrams of codeine per 100 milliliters, as to that element of the offense, the evidence is not insufficient if it merely establishes the presence of codeine in a substance alleged to be a Penalty Group 4 controlled substance.

Appellant analogizes this case to *Miles*, 357 S.W.3d at 638. There, the Court found the evidence insufficient where there was no testimony regarding the therapeutic or medicinal qualities of the promethazine in the sample in that case. *Id.* In *Miles*, the chemist testified codeine and promethazine are often prescribed together and that promethazine is an antihistamine; however, there was no evidence that "expressly stated or implied whether the promethazine found in these particular substances was or was not 'in sufficient proportion to confer on the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone.' " *Id.* (citation omitted). Under those circumstances, the Court of Criminal Appeals held that from the evidence presented, "a rational juror could not infer whether the promethazine was or was not in recognized therapeutic amounts or in sufficient proportion to confer on the compound valuable medical qualities other than those possessed by the codeine alone." *Id.* Because the evidence was insufficient as to an essential element of that particular offense, the Court had no option but to reverse and render a judgment of acquittal. *Id.*

***6** By contrast, the State relies in part on *Sanchez v. State*, 275 S.W.3d 901, 904-05 (Tex. Crim. App. 2009), wherein the evidence was found to be sufficient. In *Sanchez*, the intermediate appellate court found the evidence to be insufficient because the State's expert witness "was not able to *quantify* the Promethazine in the substance." *Sanchez v. State*, 264 S.W.3d 132, 137 (Tex. App. Houston [1st Dist.] 2007), *rev'd*, 275 S.W.3d at 905. The Court of Criminal Appeals reversed the lower court's ruling because it found the State was not required to quantify the amount of promethazine in the substance tested so long as the expert could testify as to the qualitative property of the compound, mixture, or preparation. There, when asked whether promethazine on its own had valuable medicinal qualities, the witness responded affirmatively. The Court found that testimony established more than the mere presence of promethazine, thus supporting a finding that the promethazine was "in sufficient proportion to confer on the substance valuable medicinal qualities." *Sanchez*, 275 S.W.3d at 905.

The State argues that like *Sanchez*, we should find the evidence in this case to also be sufficient. It asserts that here, the jury had before it enough evidence from which it could reasonably infer the codeine was in a sufficient proportion to satisfy the requisites of the statute and that the promethazine, similarly, had valuable medicinal qualities other than those possessed by the codeine alone. According to the State's theory, because the jury could find that the substance possessed *smelled* like prescription cough syrup, it could conclude that the substance had the same qualities as prescription cough syrup; and, that because prescription cough syrups *typically* contain both codeine and promethazine and, according to *some* labels (as opposed to tests), *usually* contain Penalty Group 4 strength codeine and promethazine in sufficient proportion to confer on the substance valuable medicinal qualities other than those possessed by the codeine alone, then the substance in this case must be a Penalty Group 4 controlled substance. We disagree. If an expert chemist were to testify that the scientific method relied upon to reach his conclusion was nothing more than the stacking of one inference upon another, upon another, upon another, upon another, upon another—as the State proposes in this case—we would be compelled to throw that testimony out as rank "junk science." Reaching such a conclusion spans an intellectual gap-too-far—a gap that we cannot tolerate in a system based upon proof beyond a reasonable doubt. Because the record contains no evidence of an essential element of the offense of possession of a Penalty Group 4 controlled substance or, alternatively, because the record contains merely a modicum of evidence of an essential element of the offense of possession of a Penalty Group 4 controlled substance, we sustain Appellant's first issue and find the evidence insufficient to support his conviction as to that offense.

BOWEN ANALYSIS

In *Bowen v. State*, 374 S.W.3d 427, 431-32 (Tex. Crim. App. 2012), the Court of Criminal Appeals held that if an intermediate appellate court concludes that the evidence supporting a conviction is legally insufficient, the court is not necessarily limited to

ordering an acquittal, but must instead remand the case to the trial court for modification of the judgment to reflect a conviction of any lesser-included offense and conduct a new punishment hearing. Furthermore, where there is proof beyond a reasonable doubt of all elements of a lesser-included offense, an appellate court should render a judgment of conviction as to that lesser-included offense. *Britain*, 412 S.W.3d at 521.

After *Britain*, in *Thornton v. State*, 425 S.W.3d 289, 299-300 (Tex. Crim. App. 2014) (footnote omitted), the Court of Criminal Appeals further clarified when a court of appeals should reverse a judgment and remand for modification to reflect a conviction of a lesser-included offense versus when a judgment should be reversed and an acquittal rendered:

> ***7** [A]fter a court of appeals has found the evidence insufficient to support an appellant's conviction for a greater-included offense, in deciding whether to reform the judgment to reflect a conviction for a lesser-included offense, that court must answer two questions: 1) in the course of convicting the appellant of the greater offense, must the [fact finder] have necessarily found every element necessary to convict the appellant of the lesser-included offense; and 2) conducting an evidentiary sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial, is there sufficient evidence to support a conviction for that offense? If the answer to either of these questions is no, the court of appeals is not authorized to reform the judgment. But if the answer to both are yes, the court is authorized – indeed required – to avoid the "unjust" result of an outright acquittal by reforming the judgment to reflect a conviction for the lesser-included offense.

Here, it is undisputed that the State was attempting to prosecute Appellant for the offense of possession of a Penalty Group 4 controlled substance, over 400 grams, and in the course of finding Appellant guilty of that offense the jury must have necessarily found every element necessary to convict Appellant of the lesser-included offenses of (1) possession of a controlled substance, Penalty Group 4, 200 grams or more but less than 400 grams, (2) possession of a controlled substance, Penalty Group 4, 28 grams or more but less than 200 grams, and (3) possession of a controlled substance, Penalty Group 4, less than 28 grams. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.118(b), (c), and (d). Because the insufficiency of the evidence in this case goes to the nature of the substance possessed, as opposed to the amount possessed, applying the standards of evidentiary review to each of these lesser-included offenses, we find the evidence is still insufficient to support a conviction as to any of the lesser-included offenses. Accordingly, we reverse the judgment finding Appellant guilty of possession of a Penalty Group 4 controlled substance, over 400 grams, and we render a judgment of acquittal.

TAMPERING WITH EVIDENCE

A person commits the offense of tampering with evidence if: (1) knowing that an investigation is pending or in progress; (2) he alters, destroys, or conceals any record, document, or thing; and (3) acts with the intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding. TEX. PENAL CODE ANN. § 37.09(a)(1); *State v. Zuniga*, 512 S.W.3d 902, 903 (Tex. Crim. App. 2017).

ANALYSIS—ISSUE TWO

Through his second issue, Appellant contends the evidence was insufficient to prove he altered, concealed, or destroyed an unknown substance because the State relied solely on an incriminating statement he made during a jail phone call in which he said, "so you know I do what any other [person] would do and I eat everything." Appellant complains the State failed to present any evidence corroborating this statement, thus rendering the evidence insufficient.

To support his argument, Appellant contends that under the *corpus delicti* rule, when the State relies on an extrajudicial confession of the accused to support a conviction, there must be independent corroborating evidence showing a crime has

actually been committed. *Fisher v. State*, 851 S.W.2d 298, 302-03 (Tex. Crim. App. 1993). *See also Salazar v. State*, 86 S.W.3d 640, 645 (Tex. Crim. App. 2002). A defendant's extrajudicial confession alone is not sufficient. *Dansby v. State*, 530 S.W.3d 213, 224 (Tex. App.—Tyler 2017, pet. ref'd).

Appellant acknowledges that the evidence presented at trial shows the following: (1) police, with the help of a confidential informant, placed a call to Appellant to make arrangements for purchasing $50 of methamphetamine, (2) the parties agreed to meet at a specific location, at a specific time, (3) Appellant arrived in a vehicle at that location, at the agreed time, and (4) Appellant was a passenger in the vehicle. Appellant also concedes that his appearance may be some evidence that "he, *at some point*, intended to engage in a narcotics transaction with the informant." (Emphasis in Appellant's brief). But Appellant further contends the record contains no evidence he arrived with any methamphetamine or tampered with any evidence at the time of the stop. Appellant notes that a search of the vehicle revealed no methamphetamine, no baggies, no other containers, no residue, and no drug paraphernalia. There was no other contraband found inside or outside the vehicle and, at the time of his arrest, the police made no effort to determine if he swallowed any substances with the intent of impairing a pending investigation.

***8** The State disagrees and contends it presented sufficient independent corroborating evidence. Specifically, the State argues the evidence established the police knew Appellant as a "known drug dealer" and that a confidential informant, in the presence of officers, called Appellant and made arrangements to purchase $50 of methamphetamine, at an agreed location, and at an agreed time. The evidence also showed that Appellant arrived at that location, at the agreed-upon time and was positively identified by the confidential informant as the person he called. The officer making initial contact with Appellant also testified that he noticed movement coming from the side of the vehicle on which Appellant was sitting. Other testimony established that Appellant made a recorded jail phone call where he admitted that he "ate everything" and that the other person in the vehicle with him was also going to buy some methamphetamine—explaining the reason for the one hundred dollars found on the floorboard of the vehicle. In that jail phone call, Appellant stated that the amount of methamphetamine he was going to sell amounted to about the size of a "sugar packet" and it would be "very easy" to swallow. Appellant also admitted that swallowing drugs was a "normal way for users and dealers alike to dispose of drugs...."

From this list of testimonial evidence, we agree with the State that the evidence presented was sufficient to independently corroborate Appellant's statement and we find the evidence was sufficient for a reasonable juror to conclude Appellant, knowing that an investigation was in progress, altered, destroyed, or concealed an unknown substance, with the intent to impair its availability as evidence in the investigation. Accordingly, we overrule Appellant's second issue.

CONCLUSION

We reverse the judgment finding Appellant guilty of possession of a Penalty Group 4 controlled substance, over 400 grams, and we render a judgment of acquittal. Furthermore, we affirm the judgment finding Appellant guilty of the offense of tampering with evidence.

All Citations

--- S.W.3d ----, 2020 WL 1146711

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